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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ahtna, Inc.
File: B-235761.3; B-235761.4
Date: December 1, 1989

DIGEST

1. Dismissal on timeliness grounds is affirmed where agency-level protest was filed more than 10 days after basis of protest was known since protest filed with General Accounting Office subsequent to agency-level protest is untimely where the original protest was untimely filed with agency.
2. Protest by firm not in line for the award if the protest were to be sustained is dismissed since the protester does not have the requisite direct and substantial interest in the contract award to be considered an interested party under General Accounting Office's Bid Protest Regulations.

DECISION

Ahtna, Inc., requests reconsideration of our summary dismissal on timeliness grounds of its protest of the award of a contract to Slana Energy, Inc., under request for proposals (RFP) No. F65517-87-R0001, issued by the Air Force for electrical power for the Alaska portion of the Over-the-Horizon Backscatter Radar System, a part of the United States early warning radar system.^{1/} We affirm the dismissal. Ahtna has filed a subsequent protest of the Air Force's determination that Slana's proposal was acceptable from a technical and financial standpoint and that Slana was a responsible offeror. We dismiss that protest.

^{1/} We have denied another unrelated protest against the award to Slana Energy, Inc. See Dynamic Energy Corp., B-235761, Oct. 6, 1989, 89-2 CPD ¶ ____.

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The RFP provided for the award of a requirements contract for a 1-year test period plus a 20-year operation period. In order to supply the electrical power required, offerors had to construct a power plant that would satisfy the Air Force requirement for 99.99 percent reliability. There were three major evaluation areas: technical, management and life-cycle cost. Life-cycle cost was of primary importance. Award was to be made to the offeror with the lowest evaluated life-cycle cost whose proposal was also acceptable in the technical and management areas, provided the offeror's cost was lower than the cost of a government constructed and operated plant.

On the closing date, the Air Force received seven proposals. Discussions were conducted with all offerors and all seven submitted best and final offers. The agency rejected one proposal as technically unacceptable and another proposal was withdrawn. The remaining five proposals were determined to be acceptable in the technical and management areas. After analyzing the life-cycle cost of each proposal, the agency made an award to Slana based on its evaluated life-cycle contract cost of \$52,628,205. Slana proposed to provide power with a combination of coal and butane and also offered as a secondary system a tie into the power system of a local utility company.

Ahtna filed its initial protest with our Office on July 14, 1989. In that protest Ahtna maintained that no other offeror was responsible. Ahtna argued that because of the extensive liquidated damages called for by the RFP the contracting officer should have screened all offerors for their ability to meet this requirement. Ahtna also argued that its total evaluated price should have been reduced by \$1,200,000 per year since this amount represents liquidated damages that, according to the contracting officer at the debriefing, should not have been included in Ahtna's life-cycle cost. Ahtna asserted that had this adjustment been made, it would be in line for award. Finally, the protester argued that Slana did not have adequate energy sources to meet the RFP's reliability requirement.

We dismissed the protest as untimely because Ahtna's agency-level protest was filed more than 10 working days after it knew or should have known the basis of its protest. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1989). Ahtna's project manager, in an affidavit supplied with the protest, stated that at the debriefing held on June 2 it became clear to him that the ability to meet liquidated damages had never been considered and that he learned from the summary sheet that the agency had not accurately calculated Ahtna's life-cycle cost because it did not subtract the \$1,200,000 per

year in liquidated damages that Ahtna had incorrectly included in its price. Ahtna filed an agency-level protest on June 20, which was denied on June 30.

Our Regulations provide that we will consider a protest after an initial agency-level protest has been filed if the initial protest was timely filed with the agency. 4 C.F.R. § 21.2(a)(3). Ahtna's protest was filed more than 10 working days after the debriefing where it learned the basis for its protest. We therefore did not consider its subsequent protest to our Office. Further, the fact that the agency considered an untimely agency-level protest does not waive our timeliness requirements. Benju Corp., B-228571, Nov. 4, 1987, 87-2 CPD ¶ 445. Although Ahtna argues that its protest is timely because it was and is still not certain whether the awardee was screened for its ability to meet the liquidated damages requirement, its own comments on the June 2 debriefing indicated that Ahtna was on notice of this protest basis. A protester may not delay filing its protest until receipt of information confirming the existence of protestable issues. See Access for the Handicapped, 68 Comp. Gen. 432 (1989), 89-1 CPD ¶ 458. We therefore think that our initial conclusion that the protest was untimely was correct.

Ahtna argues that even if its protest is untimely, we should consider it under the good cause or significant issue exceptions in our Regulations. See 4 C.F.R. § 21.2(b). The good cause exception to our timeliness requirements is limited, however, to circumstances where some compelling reason beyond a protester's control prevented the protester from filing a timely protest. Management Engineers, Inc., et al., B-233085 et al., Feb. 15, 1989, 89-1 CPD ¶ 136. There is nothing in the record indicating that such a reason exists here. The significant issue exception is limited to those untimely protests where the issue raised is one of widespread interest to the procurement community that has not been considered on the merits in previous decisions. Valentec Kisco, Inc., B-234421, Mar. 9, 1989, 89-1 CPD ¶ 261. This protest involves an agency's affirmative determination of responsibility, a matter which on numerous occasions we have indicated we do not consider under most circumstances, see, e.g., Baldt, Inc., B-235102, May 11, 1989, 89-1 CPD ¶ 445; Margaret N. Cox, 68 Comp. Gen. 163 (1988), 88-2 CPD ¶ 605, and the propriety of an agency's evaluation of one offeror, which is not an issue whose resolution would be of widespread interest to the procurement community. We therefore affirm our decision dismissing Ahtna's protest as untimely.

Moreover, it is now clear that Ahtna also is not an interested party eligible to maintain a protest against this award. The record shows that Ahtna is the fifth low acceptable offeror under the RFP, which provided for award to the low, acceptable offeror. Under our Regulations, a party must be "interested" in order to have its protest considered by our Office. 4 C.F.R. §§ 21.0(a), 21.1(a). Where, as here, there are intermediate parties that have a greater interest than the protester we generally consider the protester too remote to establish interest within the meaning of our Regulations. Caltech Service Corp., B-234424, May 1, 1989, 89-1 CPD ¶ 414. A party will not be deemed interested where it would not be in line for award even if its protest were sustained. Id. Further, Ahtna's untimely contention in both protests that no other offeror could meet the RFP's liquidated damages requirement does not establish the requisite "interest." A protester's supposition that all other offerors in line for award may be found nonresponsible is too tenuous to support a finding that the protester is an interested party. Real Cases, Inc., B-233370, Jan. 12, 1989, 89-1 CPD ¶ 34. In addition, even if we considered and accepted the assertion in Ahtna's first protest that its price should be reduced by the \$1,200,000 per year in liquidated damages that it built into its proposal, it would only be the third low offeror and still not an interested party in line for award.

Accordingly, even if we viewed the initial protest as timely, we would still dismiss the protest because Ahtna does not have the requisite interested party status. Accordingly, we affirm the dismissal of the initial protest and, as Ahtna is not an interested party, we dismiss the subsequent protest.

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General Counsel